BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SERGIO ESCALERA	)	
Claimant	)	
	)	
VS.	)	
	)	
ASPLUNDH TREE EXPERT COMPANY	)	
Respondent	)	Docket No. 1,022,821
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the July 19, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes.

ISSUES

The ALJ concluded claimant was "injured while working for the [r]espondent and that his injury arose out of and in the course of his employment."[1] She reasoned that "[t]he medical records tend to corroborate [c]laimant's allegations that his work duties and activities are causally related to his injuries."[2]

Respondent appeals this decision alleging that claimant failed to show his injuries arose out of and in the course of his employment. Distilled to its essence, respondent contends the claimant's testimony is so inconsistent that it is unreliable on the issues of

[1] ALJ Order (Jul. 19, 2005) at 1.

[2] *Id.*

causation and notice. Further, respondent alleges the ALJ "exceeded her authority in granting benefits."[3] No other issues were listed in the respondent's request for review.

Nonetheless, in its written brief to the Board, respondent argues that the ALJ erroneously excluded a witness' statement from the record. This, however, is not an issue the Board can address as it is an evidentiary issue and the Board has no jurisdiction at this juncture to address such matters.[4]

Claimant maintains the preliminary hearing Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant is employed as a tree trimmer. While he has some supervisory responsibilities he routinely climbs trees all day long. In April 2004, he began to experience bilateral pain in his shoulders, the left being more problematic. He noticed the pain would become more prominent when he was using the tree pruners and at times the chipper. These complaints came on over a period of months and not as the result of a single event. Claimant believed the source of his pain was his work activities.

Claimant testified that he notified his supervisor, Charlie Molt, about the pain in his shoulder while performing his job and figured that he would be sent to a doctor, but was not. When the pain became too much for claimant he went to see Dr. Ron C. Ferris his family physician. He was given something for the pain and sent to see Dr. Daniel J. Prohaska. Claimant testified that even though respondent did nothing when he informed them that he was seeing Dr. Ferris for his shoulder pain, he still informed respondent that he was going to see Dr. Prohaska.

After his visit with Dr. Prohaska on June 17, 2004, claimant provided his supervisor, Mr. Molt, with the test results and the physician's restrictions. Dr. Prohaska's note indicates claimant complained of work worsening his complaints and also references difficulty while pushing a branch into a wood chipper and the resulting pulling motion was felt in his shoulder. It is somewhat unclear whether these restrictions were honored. In any event, claimant continued to work up until January 4, 2005 when he had surgery on his left shoulder.

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[3] Application for Review.

[4] See K.S.A. 44-551 and K.S.A. 44-534a.

On January 14, 2005, claimant went to his union office and received assistance in filling out paperwork for a workers compensation claim. Claimant indicated that he did not put on his workers compensation form that he was injured at work because according to him he was not sure "how it happened if that is – if it is something that happened little by little in time?".[5] Up to this point, claimant had been submitting this claim to his private health carrier, paying the copays and deductibles himself.

Claimant's supervisor, Charles Molt also testified, and denied that claimant notified him of any work-related injury in April or June 2004. While he admits claimant complained of his shoulder hurting and all along tendered his medical reports to him, Mr. Mott testified that he first learned of the claimant's complaints in the late summer or early fall 2004.[6] And it was in February 2005 that Mr. Molt finally learned claimant was alleging those shoulder complaints were related to his work activities.[7]

On March 1, 2005, claimant met with Mr. Molt and another supervisor, Ed Bradshaw. During this meeting claimant's situation was discussed and according to Mr. Molt, claimant repetitively stated that he did not think that his injury was from his work, but that his doctor was the one that told him this.

The ALJ found that claimant's bilateral shoulder injuries arose out of and in the course of his employment with respondent and that claimant provided timely notice of that claim. An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase 'out of' employment points to the cause or origin of the worker's accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the

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[5] P.H. Trans. at 21. Claimant does not speak English thus his answers are somewhat abbreviated.

[6] *Id.* at 24.

[7] *Id.* at 27.

[8] K.S.A. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

> resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

Under the facts of this case, the Board agrees with and affirms the ALJ's conclusion that claimant's injury arose out of and in the course of his employment. Claimant's job as a tree trimmer is one that involves routine use of both his shoulders. He consistently maintained to the physicians, to his employer and during the course of his testimony at the preliminary hearing that this injury is not one that happened on one particular day, but over the course of time. The ALJ correctly noted that the medical records corroborate claimant's contention of a repetitive injury.

The Board also agrees with the ALJ's legal conclusion on the issue of notice. K.S.A. 44-520 provides:

> **Notice of injury.** Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant testified that he told Mr. Molt of his shoulder complaints and of the fact that he was seeking treatment. He tendered the medical reports, test results and the physician's restrictions to Mr. Molt. Claimant also testified he told Mr. Molt of his problems while performing his job. Although Mr. Molt seemed not to understand the import of all this information, the Board agrees with the ALJ's analysis that claimant provided the notice as required by the Act as far back as April 2004. Moreover, it appears that he provided additional notice on January 14, 2005 when he provided a document to his employer. At that point, claimant had been off work 10 days for his shoulder surgery. Thus, under both scenarios, claimant has met the statutorily required notice element.

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[10] *Id.*

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 19, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September, 2005.

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BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
Elizabeth R. Dotson, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director